STATE OF MICHIGAN

COURT OF APPEALS

ROBERT NUNNALLY,

Plaintiff-Appellant,

v

GENERAL ASSEMBLY,

Defendant-Appellee,

and

DUNHAM'S ATHLEISURE CORPORATION and PACIFIC CYCLE, INC.,

Defendants.

UNPUBLISHED
January 28, 2014

No. 310634
Wayne Circuit Court
LC No. 11-002311-NP

Before: MURPHY, C.J., and MARKEY and RIORDAN, JJ.

Riordan, J. (*dissenting*)

The trial court found that a jury would be left to speculate whether General Assembly (GA) or another assembly company worked on the bicycle and granted the defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). I would affirm.

Plaintiff's claim against GA is premised on negligence. "To establish a prima facie case of negligence, a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages." *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000) (footnote omitted). The third element includes both cause in fact and proximate or legal cause. *Id.* at n 6; *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 496; 668 NW2d 402 (2003). To establish cause in fact generally requires a showing that 'but for' the defendant's actions, the plaintiff's injury would not have occurred. *Skinner v Square D Co*, 445 Mich 153, 163; 516 NW2d 475 (1994). A plaintiff cannot establish legal or proximate cause without first establishing cause in fact. *Id.*

"While a plaintiff need not prove that an act or omission was the *sole* catalyst for his injuries, he must introduce evidence permitting the jury to conclude that the act or omission was *a* cause." *Craig v Oakwood Hosp*, 471 Mich 67, 87; 684 NW2d 296 (2004) (emphasis in original). The plaintiff may prove causation through circumstantial evidence, but that evidence

"must facilitate reasonable inferences of causation, not mere speculation." *Skinner*, 445 Mich at 164. "An explanation that is consistent with known facts but not deducible from them is impermissible conjecture." *Wiley*, 257 Mich App at 496. To establish cause in fact, a plaintiff must present substantial evidence from which a jury could conclude that, more likely than not, the plaintiff's injuries would not have occurred but for the defendant's conduct. *Skinner*, 445 Mich at 164-165.

There is no dispute that plaintiff purchased his bicycle at the Riverview store. Leo Garcia, the store's district manager, did not know whether GA actually worked on the bicycle, but assumed that it did because, to his knowledge, GA was the only assembly company that worked at the Riverview store. But, the store's manager, James Duggan, and assistant manager, David Kanclerz, testified that during the 2010 time period when the bicycle was sold to plaintiff, other retail assemblers were providing bicycle assembly services at the Riverview Dunham's. Duggan testified that he could not remember the name of the other assembler. Kanclerz testified in his deposition that at least three companies, "Diamond/General Assembly," "Jez" and "Bikes to Go/Bikes in Town" performed retail assembly at the Riverview Dunham's during the relevant time period. Garcia's, Duggan's, and Kanclerz deposition testimony serves only to create a question of fact with respect to the causation element of plaintiff's claim. It does not, as the majority concludes, create a genuine issue of fact as to whether GA was negligent. It is just as likely that any of the three companies mentioned in deposition testimony assembled the bicycle in issue and could possibly be found liable under a negligence theory.

Plaintiff also offers circumstantial evidence indicating that if the bike were assembled elsewhere and returned to the Riverview store, GA would have worked on it after it was returned. However, as stated, there is an issue of fact as to who may have worked on the bicycle. Assistant manager Kanclerz testified that a bike that is returned by one customer is tuned up by an assembly company, "such as GA," before it is returned to the floor for resale. However, there is testimony that any of three companies were doing assembly work at the Riverview Dunham's during this time period. While there may have been testimony to the contrary, that again only creates a question of fact as to which assembly company worked on the bicycle. But while such evidence shows that it is possible that GA assembled or tuned up the bike that plaintiff purchased, it does not show that it is more likely than not that GA, as opposed to another assembler, worked on the bike. *Skinner*, 445 Mich at 166-167. Again, we are left to speculate.

Further, it is uncontested that mechanics created invoices documenting the bikes they worked on and that the invoices were the basis on which Dunham's paid the assembly companies. It also is uncontested that GA's invoices from the relevant time period do not show that its mechanics worked on the bike that plaintiff purchased. Plaintiff argues that one could infer that a GA mechanic worked on his bike and failed to record it on an invoice because GA mechanics were lax in other respects, such as by neglecting to affix a sticker to each bike and filling out invoices differently from the way the form directed. I disagree.

First, the evidence on which plaintiff relies does not necessarily show that GA mechanics were lax in other respects. Assistant manager Kanclerz testified that mechanics from GA put

stickers on the underside of the bottom bracket of each bike they assembled.[1] While store manager Duggan reached the conclusion that the GA mechanics did not always apply the stickers because he found stickers on the floor, he did not testify whether he knew that any bikes actually were missing stickers or that he saw mechanics release a bicycle without a sticker affixed to it. Further, while plaintiff has shown that the GA invoices were not filled out in the manner designated by the form itself,[2] no one testified as to how mechanics were required to fill out the invoices, so it is not known whether the mechanics were necessarily remiss in the way they completed the forms. Second, even if such evidence permits an inference that a mechanic worked on plaintiff's bike but forgot to record it on an invoice, it is equally as likely that plaintiff's bike was not recorded on a GA invoice because a GA mechanic did not work on it. Because there is no evidence to suggest that one explanation is more probable than the other, and we are left to mere speculation, the evidence does not establish a genuine issue of fact with respect to the causation element of plaintiff's claim. *Skinner*, 445 Mich at 166-167.

Therefore, the trial court properly granted defendant's motion for summary disposition.

/s/ Michael J. Riordan

[1] GA mechanic Scott Loubert described the sticker as a "little white sticker" with spaces for the mechanic's initials and the date. GA mechanic Douglas Moore described the sticker as black and red with GA's name and a space for the mechanic's initials.

[2] The forms have spaces for recording quantity, SKU number, and description. It appears that GA mechanics listed each bike individually, using an abbreviation of the brand name in the quantity space, the bike's model name or number in the SKU space, and the bike's serial number in the description space.